

March 12, 2008

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Western Resource Advocates

Date of Filing: February 12, 2008

Case Number: TFA-0246

This Decision concerns Western Resource Advocates' (WRA) Appeal from a determination that the Department of Energy's (DOE) Western Area Power Administration (WAPA) issued to it on January 30, 2008. In that determination, WAPA denied WRA's fee waiver request in conjunction with a document request WRA submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as DOE implemented in 10 C.F.R. Part 1004. WAPA denied WRA's fee waiver request because it stated that WRA failed to meet its burden in showing that granting the fee waiver is in the public interest. In its Appeal, WRA asks us to grant it a fee waiver.

I. Background

The Eastern Plains Transmission Project (EPTP) is a construction project for hundreds of miles of power lines over several Great Plains states. The Tri-State Generation and Transmission Association (Tri-State), a WAPA contractor, is one of the EPTP's builders. Memorandum of telephone conversation between Patricia Land, Paralegal Specialist, WAPA, and David M. Petrush, Attorney-Examiner, Office of Hearings and Appeals (OHA), December 20, 2007. WRA filed a FOIA request for numerous records regarding the EPTP. In particular, WRA sought records regarding Tri-State's EPTP "Integrated Resource Plan," WAPA's annual reports to Congress, and correspondence and memoranda on numerous EPTP-related topics. WRA requested that WAPA waive all the fees associated with processing its FOIA request. Request Letter, dated June 29, 2007.

WAPA partially denied WRA's fee waiver request because WRA failed to satisfy Factor B of the public interest fee waiver factors (see factor definitions in the Analysis section, below) because "documents and other information [WRA is] requesting already exists in the public domain. . . ." WAPA estimated that processing WRA's request would cost approximately \$80,955.66. Determination Letter, dated November 7, 2007 (*italics removed*). However, without explanation, WAPA offered to absorb 40% of the processing costs. Letter from WAPA to WRA, dated August 30, 2007.

WRA appealed to OHA, challenging WAPA's partial denial of its fee waiver request. Namely, WRA complained that the "determination . . . [did] not identify which records are in the public domain, nor where they can be found." Also, WRA "appeal[ed] WAPA's failure to provide a rationale that makes sense for its estimated \$80,000 cost to provide the requested documents and information." Appeal Letter, dated November 28, 2007.

OHA found that WAPA improperly denied WRA's fee waiver request because it did not explain to WRA where in the public domain its requested documents reside. *Western Resource Advocates*, 30 DOE ¶ ____ (Jan. 11, 2008) (Case No. TFA-0233).¹ Therefore, we granted WRA's Appeal. We remanded the case to WAPA to issue a new determination letter. We required that on remand, WAPA must explain where in the public domain WRA's requested documents reside and if those documents have "met a threshold level of public dissemination," as required by *Campbell v. Dep't of Justice*, 164 F.3d 20, 36 (D.C. Cir. 1999) (citation omitted). We said that in the alternative, WAPA may base its new fee waiver determination on analysis considering the DOE's fee waiver factors that it left unaddressed in its initial determination – the commercial interest factors and public interest Factors A, C and D. We did not reach the fee estimation issue.

In response to the remand, WAPA issued a new determination. WAPA did not address the commercial interest fee waiver factors. WAPA conceded that WRA satisfied public interest fee waiver Factor A because the EPTP concerns the government's activities. WAPA stated that WRA did not satisfy public interest fee waiver Factor B because many of the documents it requested are posted on web sites that it listed in its determination and therefore meet a threshold level of public dissemination. Determination Letter, dated January 30, 2008.

WAPA stated WRA is not entitled to a fee waiver for the documents that it requested that are not publicly available because WRA did not satisfy public interest fee waiver Factors C and D. Regarding Factor C, WAPA stated that WRA's intention to "disseminate the requested information through its website, newsletter, public forums, and interaction with government and interested organizations is not significantly different than the efforts WAPA has already accomplished." WAPA also stated that, "[M]aking the information available to anyone who may access it does not demonstrate an increased understanding to the public." WAPA determined that the information WRA requested "is common knowledge among the landowners, residents and the general public affected by the construction of EPTP." Regarding Factor D, WAPA stated, "Information, such as[] routine correspondence, emails, [and] draft documents . . . does not significantly contribute to the public's understanding." Determination Letter, dated January 30, 2008.

WRA filed the present appeal with OHA. Appeal Letter, dated February 11, 2008. WRA narrowed the scope of its request to documents that are not publicly available. WRA also asks us to grant it a fee waiver. *Id.*

¹ OHA decisions issued after November 19, 1996 may be accessed at <http://www.oha.doe.gov/foia1.asp>.

II. Analysis

“Intended to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed . . . the [FOIA] requires federal agencies to disclose information upon request. . . .” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (citation and quotations omitted).

The FOIA generally requires document requesters to pay for search and duplication costs. *See* 5 U.S.C. § 552(a)(4)(A)(i). However, each agency has promulgated regulations explaining when a requester is entitled² to receive documents at no charge or reduced charge. DOE regulations set forth “two basic requirements, both of which must be satisfied before fees will be waived or reduced.” 10 C.F.R. § 1004.9(a)(8); *see also* 5 U.S.C. § 552(a)(4)(A)(iii) (providing authorization for DOE’s fee waiver regulations). First, a requester must show that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 10 C.F.R. § 1004.9(a)(8)(i) (internal quotations omitted). This is known as the “public interest” requirement. Second, a requester must show that “disclosure of the information is not primarily in the commercial interest of the requester.” 10 C.F.R. § 1004.9(a)(8)(ii) (internal quotations omitted). This is known as the “commercial interest” requirement.

The public interest and commercial interest requirements each have non-exclusive factors to show when they are met. A FOIA officer should address the following factors to determine if a requester meets the public interest requirement:

- (A) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government;
- (B) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities;
- (C) The contribution to an understanding by the general public of the subject likely to result from disclosure; and
- (D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(i)(A)-(D) (internal quotations omitted).

A FOIA officer should address the following factors to determine if a requester meets the commercial interest requirement:

² The regulations state, “When these requirements are satisfied . . . the waiver or reduction of a FOIA fee *will be* granted.” 10 C.F.R. § 1004.9(a)(8) (emphasis added).

- (A) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and if so
- (B) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

10 C.F.R. § 1004.9(a)(8)(ii)(A)-(B) (internal quotations omitted).

“[F]ee waiver requests must be made with ‘reasonable specificity’ . . . and [be] based on more than ‘conclusory allegations.’” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (citations omitted). “Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” *Id.* (citation and quotations omitted). The requester has the burden of satisfying the fee waiver factors. *Larson v. Central Intelligence Agency*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (citation omitted).

Here, we will address WRA’s commercial interest in the documents it requested. Regarding the public interest in disclosure, WAPA conceded that WRA has met Factor A. Therefore, we will address public interest fee waiver Factors B, C and D.

Commercial Interest

The first commercial interest factor requires us to determine if, as a threshold matter, the requester has a commercial interest that disclosure of the requested documents would further. DOE’s FOIA regulations do not define “commercial interest.” However, the D.C. Circuit has “consistently held” that we should give the word “commercial” its “ordinary meaning.” *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (applying an “ordinary meaning[]” of the word “commercial” in a FOIA Exemption 4 case); *see also McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987) (citing *Pub. Citizen Health Research Group* to apply an “ordinary meaning” of the word “commercial” in a FOIA fee waiver case).

Here, WRA has flatly stated that it “will not use the requested information to earn a profit.” Letter from WRA to WAPA, dated Aug. 3, 2007. For this reason, WRA does not have a commercial interest in the requested documents, within the ordinary meaning of the word “commercial.” Therefore, we find that WRA has carried its burden in showing that it has met the commercial interest requirement.

Public Interest Factor B

Under Factor B, disclosure of the requested information must be likely to contribute to the public understanding of specifically identifiable government operations or activities, i.e., the records must be meaningfully informative in relation to the subject matter of the request. This factor focuses on whether the information is already in the public domain or otherwise common knowledge among the general public. *See, e.g., James Salsman*, 29 DOE ¶ 80,223 (Sept. 7,

2005) (Case No. TFA-0114) (citation omitted) (stating, “If the information is already publicly available, release . . . would not contribute to public understanding [i.e., release would not have informative value] and a fee waiver may not be appropriate”).

Here, WRA has narrowed the scope of its request to documents that are not publicly available. Release of those documents will necessarily contribute to the public understanding of the EPTP. Therefore, we find that WRA has satisfied Factor B.

Public Interest Factor C

Factor C requires that the requested documents contribute to the general public’s understanding of the subject matter. Disclosure must contribute to the understanding of the public at large, as opposed to the understanding of an individual requester or of a narrow segment of interested persons. Thus, the requester must have the intention and ability to disseminate the requested information to the public. *See Roderick Ott*, 26 DOE ¶ 80,187 (May 16, 1997) (Case No. VFA-0288); *James L. Schwab*, 22 DOE ¶ 80,133 (Oct. 17, 1991) (Case No. LFA-0152).

In this case, WRA contends that

it will share the requested information with its members and members of the public, through regular contact with the public, conservation organizations, and government decision-makers. WRA will also inform the public of the contents of responsive documents through publication of its newsletter and through updates on its website.

Letter from WRA to WAPA, dated Aug. 3, 2007. WAPA says that WRA’s dissemination plan “is not significantly different than the efforts WAPA has already accomplished.” “Further,” WAPA says, “making the information available to anyone who may access it does not demonstrate an increased understanding to the public.” WAPA concluded that “the information is available to the public and is common knowledge among the landowners, residents and the general public affected by construction of [the] EPTP.” Determination Letter, dated Jan. 30, 2008.

We find that WRA has shown the intention and ability to disseminate the information it requested from WAPA. We have previously found that a requester satisfies Factor C when, as here, it publishes the requested information on its website and works to educate the public through a variety of forums, including public meetings and presentations. *Citizen Action*, 28 DOE ¶ 80,277 (April 1, 2003) (TFA-0016).

We do not agree with WAPA’s contention that the information WRA now seeks is common knowledge in the surrounding community. Since WRA is asking for non-public information, we do not see how it can be common knowledge. Even if it were, whether any particular segment of the public already has the requested information is not part of the test for satisfying Factor C, which focuses on whether WRA has the ability and intent to disseminate the requested information to the public at large. Similarly, whether WRA’s methods of dissemination overlap with the methods WAPA has used to disseminate the information is also not part of the test for satisfying Factor C. Accordingly, we find that WRA has satisfied Factor C.

Public Interest Factor D

In order to satisfy the requirements of Factor D, the requested documents must contribute significantly to the public understanding of the operations and activities of the government. “To warrant a fee waiver or reduction of fees, the public’s understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must likely be enhanced by the disclosure to a significant extent.” *Roderick Ott*, 26 DOE ¶ 80,187 (May 16, 1997) (Case No. VFA-0288).

Here, WRA contends that

the public understanding of interactions between Western, Tri-State and various contractors, consultants and government agencies is not generally understood, and the disclosure of the requested information will help raise this level of understanding. . . . This information has not been disclosed to the public, nor has it been the subject of widespread public debate, personal notice, or public comment. The requested information will clarify previously released public information in that it will inform the public of deliberations and communications that underlie decisions of [WAPA] with respect to energy and resource development. . . . [T]he information is not already publicly available. Correspondence and communications between [WAPA], Tri-state and consultants, contractors and others associated with the EPTP are not maintained in an agency or library or reading room. The contribution to the public understanding from disclosure of the requested documents would thus be significant.

Letter from WRA to WAPA, dated Aug. 3, 2007.

In response, WAPA stated that, “Due to WAPA’s and Tri-State’s extensive efforts to communicate with the public, [WAPA has] determined that the release of the documents requested by WRA would not contribute to the public understanding. . . . WAPA has therefore found that WRA’s request does not meet the requirement of Factor D.” Determination Letter, dated Jan. 30, 2008. WAPA further stated that the publicly unavailable information that WRA requested, “such as[] routine correspondence, emails, draft documents, as requested by WRA does not significantly contribute to the public’s understanding.” *Id.*

We contacted WAPA to evaluate its Factor D reasons for denying WRA’s fee waiver request. A WAPA employee stated that WAPA informally polled its employees and estimated that it has roughly 47,000 pages responsive to WRA’s request. Memorandum of telephone conversation between Patricia Land, Paralegal Specialist, WAPA, and David M. Petrush, Attorney-Examiner, OHA, February 28, 2008. WAPA’s general impression from its employee poll is that the non-publicly available documents consist of administrative minutia. WAPA cannot yet justify its impression with specific information because it has not yet reviewed the documents. *Id.*

Because WAPA cannot yet justify its Factor D reasons for denying WRA’s fee waiver request with specific information, we cannot yet evaluate whether WAPA’s disclosure of WRA’s requested documents will enhance the public understanding of the EPTP. In similar cases we have remanded to the issuing authority so that it can provide more information. For example, in

James L. Schwab, the issuing authority denied a requester's fee waiver request because the responsive documents "do not contain anything 'meaningfully informative' that would contribute to public understanding of government operations or activities." *James L. Schwab*, 21 DOE ¶ 80,154 (Oct. 17, 1991) (Case No. LFA-0152). Yet, the issuing authority had "not yet concluded its search for responsive documents." We said that, "Without knowing what information would be released, [we cannot make] a meaningful determination of the public interest [in releasing the documents]." Therefore, the issuing authority's "determination to deny the request for a fee waiver was premature." *Id.*; see also *Gov't Accountability Project*, 23 DOE ¶ 80,139 (Aug. 27, 1993) (Case No. LFA-0312) (remanding a case where OHA could not evaluate the agency's fee waiver denial because the agency had not provided a reason for denying the requester's fee waiver request or determined what information would be released to the requester).

Following *James L. Schwab*, we will remand to WAPA so that WAPA can review the documents responsive to WRA's request. However, due to the large number of responsive documents in this case, we will not require WAPA to perform a complete document review, as we did in *James L. Schwab*. Instead, we will require WAPA to review documents responsive to WRA's request to the extent necessary to enable WAPA to issue a new determination justifying its Factor D decision with specific information. We will then be able to compare WRA's stated reasons for its fee waiver request, listed above, with WAPA's specific information, to determine if WRA carried its burden of satisfying fee waiver Factor D.

It Is Therefore Ordered That:

(1) The Appeal that Western Resource Advocates filed on February 12, 2008, OHA Case No. TFA-0246, is denied in part and remanded to the Western Area Power Administration. The Western Area Power Administration may review the documents responsive to Western Resource Advocates' request to the extent necessary to issue a new determination justifying its public interest fee waiver Factor D decision with specific information. In the alternative, the Western Area Power Administration may grant the Western Resource Advocates' fee waiver request.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 12, 2008